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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1952

No. 201

FRED SLENKER and ELIZABETH SLENKER,
Petitioners,

vs.

GRAND LODGE OF THE STATE OF ILLINOIS OF THE INDEPENDENT ORDER OF ODD FELLOWS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

HUGH M. MATCHETT,
DAVID F. MATCHETT, JR.
WALTER F. DODD,
HUBERT L. WILL,
Chicago, Ill.

Dated: Chicago, Ill., July 14, 1952.

BARNARD & MILLER, 33 S. Market St., Chicago 6. FRanklin 2-0562

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vs.

GRAND LODGE OF THE STATE OF ILLINOIS OF THE INDEPENDENT ORDER OF ODD FELLOWS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Your petitioners, Fred Slenker and Elizabeth Slenker, respectfully pray for a writ of certiorari herein to review a final order (Rec. 83) of the Supreme Court of Illinois, being the highest court of said State, by which order said court denied two motions (Rec. 39, 81) to vacate an order (Rec. 38) dismissing a writ of error (Rec. 1) sued out in said court to review a decision (Rec. 6) of the Appellate Court of Illinois, Second District, on federal and

state constitutional grounds (Rec. 300), by which decision the said Appellate Court affirmed a judgment of the Circuit Court of Henry County, Illinois (Rec. 25), after trial by jury (Rec. 7), notwithstanding verdicts in favor of petitioners (Rec. 7), that petitioners' complaint be dismissed at their costs (Rec. 7); and to review said order of dismissal (Rec. 38).

The action in the trial court was one for damages for personal injuries sustained by petitioners in a collision between their automobile and a car driven by an agent of the respondent while engaged in carrying on the business of the corporation and while acting within the scope of his employment as a proximate result of his negligence (Rec. 7, 8). The cause of action accrued in Henry County, Illinois. The trial court entered judgment for the defendant notwithstanding verdicts totalling Twenty-four Thousand Dollars ($24,000.00) in favor of petitioners on the ground the defendant was a charitable corporation. Petitioners appealed to the Illinois Appellate Court, Second District, which affirmed the judgment on the ground the defendant corporation was a charitable corporation whose assets were all held in trust for the purposes of the Independent Order of Odd Fellows and these assets had to be protected (Rec. 74).

Petitioners after first exhausting all possibility of obtaining further review by appeal within the State judicial system (Rec. 25, 27), sued out a writ of error (Rec. 1) in the Supreme Court of Illinois to review the decision of the Appellate Court on state and federal constitutional grounds (Rec. 300), i.e., that the State of Illinois in enforcing any immunity to judgment deprives an injured person of his fundamental right to personal security and property without due process of law and denies to him the equal protection of the law, contending that the constitutional questions had arisen for the first time in the

Appellate Court upon the rendition of the decision and the extinction of any possibility of further review by appeal without fault on the part of either of the petitioners (Rec. 302). The Supreme Court of Illinois on motion of respondent (Rec. 28) dismissed the writ of error without opinion (Rec. 38) and subsequently denied two motions of petitioners to set aside the order of dismissal (Rec. 39, 81). Petitioners seek further review by this court on certiorari to reverse not only the order refusing to set aside the order of dismissal but the order of dismissal as well (Rec. 83, 38).

OPINIONS BELOW.

The Supreme Court of Illinois dismissed the writ of error without opinion. The opinion of the Appellate Court of Illinois, Second District, is reported as *Slenker* v. *Gordon,* 344 Ill. App. 1. It is printed in the record commencing at page 6.

JURISDICTION.

Procedural Aspects

The Supreme Court of Illinois dismissed the writ of error on January 16, 1952 (Rec. 38). This was a void order because it was entered in violation of the rules of court. (See discussion below at page 4). The term of court expired on January 28, 1952 (Rec. 38). Prior to June 21, 1933, the order of dismissal, had it been a valid order, would have become a conclusive adjudication upon the expiration of the term. (*Barnard* v. *Michael,* 392 Ill. 130.) It now could only become a conclusive adjudication upon the expiration of thirty days from the date of its rendition, i.e., February 15, 1952 (Sec. 82, Ch. 77, Ill. Rev. Stat. 1951). On February 1, 1952 petitioners filed a motion and

supplemental motion to set aside and vacate the order of dismissal (Rec. 39). Prior to June 21, 1933, the order of dismissal, had it been a valid order, could have been modified, set aside or vacated prior to the expiration of the term of court at which it was rendered (*Corwin* v. *Rheims,* 390 Ill. 205; *Department of Public Works & Buildings* v. *Legg,* 374 Ill. 306) or in pursuance of a motion made at that term (*Corwin* v. *Rheims,* 390 Ill. 205; *Hosking* v. *Southern Pacific Co.,* 243 Ill. 320; *Lenhart* v. *Miller,* 375 Ill. 346). It therefore could now be modified, set aside or vacated in pursuance of a motion made within thirty days from the date of its rendition (Sec. 83, Ch. 77, Ill. Rev. Stat. 1951). Prior to June 21, 1933, the order of dismissal, if void, could have been modified, set aside or vacated after the expiration of the term at which it was rendered at any time. (*Ward* v. *Sampson,* 395 Ill. 353; *Barnard* v. *Michael,* 392 Ill. 130.) It therefore could now be modified, set aside or vacated after the expiration of the term at which it was rendered at any time (Sec. 84, Ch. 77, Ill. Rev. Stat. 1951). These were denied on March 11, 1952 (Rec. 83). This is the final order for purposes of determining when the time for filing a Petition For Writ of Certiorari starts to run. *Market Street R. Co.* v. *Railroad Commission of California,* 324 U.S. 548, 552; *Gypsy Oil Co.* v. *Escoe,* 275 U.S. 498, 499. Time for filing a petition for writ of certiorari, which would otherwise have expired June 9, 1952, was extended to and including June 23, 1952, by order of Mr. Justice Minton dated June 6, 1952 (Rec. 312). Further extension was granted to and including July 16, 1952, by order of Mr. Justice Jackson dated June 17, 1952.

The jurisdiction of this court is invoked under 28 U.S.C. 1257(3).

The Order Dismissing the Writ of Error was Void.

In Illinois the Supreme Court of the State "has not only

the inherent power to prescribe rules of practice and procedure, but the power is expressly conferred by the statute. Ill. Rev. Stat. 1951, c. 110, § 126. [Art. 1, Sec. 2(1) Civil Practice Act 1951: 'The Supreme Court of this State shall have power to make rules of pleading, practice and procedure for the * * * Supreme Courts supplementary to but not inconsistent with the provisions of this Act, and to amend the same * * *.'] *Such rules, when established, have the force of law. People* v. *Callopy*, 358 Ill. 11; *Lancaster* v. *Waukegan & Southwestern Railway Co.*, 132 Ill. 492." (Italics ours.) *Gyure* v. *Sloan Valve Co.*, 367 Ill. 489; *People* v. *Craig*, 404 Ill. 505. Such rules "*are binding on this and other courts the same as on litigants.*" *Swain* v. *Hoberg*, 380 Ill. 442. "*A mandatory rule which limits the power of the Court as well as the parties must be complied with, and acts not complying therewith are void.*" (Italics ours.) Sec. 176, Courts, 21 C.J.S. p. 279, n. 63.

In the present case the Supreme Court of Illinois violated its own rules in three important respects in entering its order dismissing the writ of error. It thus denied petitioners due process of law and denied to them the equal protection of the laws of the State of Illinois in violation of the 14th Amendment. Its order was therefore void and of no effect.

First: The Supreme Court of Illinois violated its own rules in entertaining the motion to dismiss the writ of error at the time the motion was presented for consideration. Rule 28 (Sec. 259.28, Ch. 110, Ill. Rev. Stat. 1951) provides that: "the rules of this court referring to appellant and appellee shall, to the extent applicable, include plaintiff in error and defendant in error in criminal cases, and in civil cases where writ of error is preserved as a method of review." Rule 41 (Sec. 259.41, Ch. 110, Ill. Rev. Stat. 1951) provides: "The abstract and the brief of the appellant in

the Supreme Court * * * must be filed in the Clerk's office on or before 20 days before the first day of the term at which the cause will stand for hearing, *unless the time for filing the same is extended.*" (Italics ours.) The appellee under the rule has 20 days from the date he is served with a copy of the appellant's brief in which to file his brief. Rule 41 is applicable to writs of error since there is no special statute regulating the filing of briefs in support of or answer to a writ of error. Rule 42 (Sec. 259.42, Ch. 110, Ill. Rev. Stat. 1951) provides that *all cases* other than criminal are to be placed on the docket and called for hearing in the order in which the records have been filed with the Clerk. Rule 43 (Sec. 259.43, Ch. 110, Ill. Rev. Stat. 1951) with certain exceptions not here relevant provides: "Where, by reason of an extension of time for filing briefs, the brief of the appellee is not due and is not filed at the time the cause is called for hearing the cause *will be continued.*" (Italics ours.) In this case petitioners as plaintiffs in error had filed their record in the office of the Clerk of the Supreme Court of Illinois more than 20 days before the commencement of the January Term 1952 which began on the second Monday of January (Sec. 6, Ch. 37, Ill. Rev. Stat. 1951) and the *scire facias* had been served before that date. On December 21, 1951, Mr. Justice Daily of the Supreme Court of Illinois entered an order extending the time for plaintiffs in error to file abstracts and briefs to February 13, 1952 (Rec. 44, 85). Manifestly the briefs of appellees would not be filed until after February 13, 1952, which was after the January Term, 1952, and the cause automatically under the rules was continued from the January Term 1952, to which it had originally been docketed, to the March Term 1952. Notwithstanding this automatic continuance under its own rules, the Supreme Court of Illinois proceeded to entertain a motion to dismiss the writ of error at the January Term 1952 and to grant the

motion to dismiss at that term (Rec. 28, 38). Under its own rules it had no right or power to do so.

Second: The Supreme Court of Illinois violated its own rules in granting the motion to dismiss the writ of error on January 16, 1952 (Rec. 38) the third day of the January Term 1952. Rule 70 (Sec. 259.70, Ch. 110, Ill. Rev. Stat. 1951) provides in part: "In all cases in the reviewing court where the defendant in error or appellee desires to file a motion in the nature of a plea, he shall file his motion in the office of the clerk not later than the first day of the term to which the cause is docketed, and the plaintiff in error or appellant or any co-parties who do not join in the motion shall file their suggestions, if any, in opposition to the motion on or before the fifth day of the term or within such further extended time as the court may grant upon application made within such five days." The January Term of the Supreme Court of Illinois began on January 14, 1952 (Sec. 6, Ch. 37, Ill. Rev. Stat. 1951). The motion of defendants in error to dismiss the writ of error was filed on that date. It asked dismissal of the writ of error on the grounds it was not filed within 40 days after the judgment of the Appellate Court became final, i.e., a plea of limitations (Rec. 28). If correct, this ground would bar the prosecution of the writ of error. Prior to the adoption of Sec. 86½ of the Civil Practice Act (Sec. 210a, Ch. 110, Ill. Rev. Stat. 1951) this defense would have to be raised by plea. *Kerner* v. *Thompson*, 365 Ill. 149; *Peterson* v. *Manhattan Life Ins. Co.*, 244 Ill. 329, 334. That Act provides it shall now be raised by motion in lieu of a plea. Petitioners were therefore entitled to five days in which to respond to this motion. The Supreme Court of Illinois, in violation of its own rules, decided the motion on January 16 before the period of five days expired, depriving petitioners of their opportunity to answer the motion. In *Oxman* v. *Baker County*, 115 Ore. 436, 448, the court had

before it a case involving a judgment entered in violation of a rule of court that was mandatory. A judgment had been entered in the trial court on November 1, 1924. On December 27, 1924, the trial court entered an *ex parte* order without notice to plaintiffs directing an entry of judgment identical with that of November 1, 1924 but allowing defendant until March, 1925, in which to prepare and submit a bill of exceptions. A rule of the trial court provided that a bill of exceptions *must* be entered within 30 days after judgment. The Supreme Court of Oregon held the rule binding upon the court, and held the order of December 27, 1941, was a nullity stating: "Where a court has established rules for its government and that of suitors, there exists no discretion in the court to dispense at pleasure with their rules, or to innovate an established practice." See also Sec. 176, Courts, 21 C.J.S., p. 279, n. 63. That decision is good law and is applicable here. It follows the order of dismissal in the instant case was a void order.

Third: The Supreme Court of Illinois violated its own rules in dismissing the writ of error on January 16, 1952, because Rule 63 (Sec. 259.63, Ch. 110, Ill. Rev. Stat. 1951) provides that a defendant in error shall not be at liberty to enter his appearance *and compel the plaintiff in error to proceed with the cause* unless the defendant in error shall have given the plaintiff in error 20 days' notice before the term of his intention to enter his appearance *and have the cause proceed to a hearing* and no 20-day notice of such intention was given in this cause. (Italics ours.) It follows that said order dismissing the writ of error is void.

Substantive Aspects

In *Stembridge* v. *State of Georgia*, 72 S. Ct. 834, 837-8, this court said:

> "Where the highest court of the state delivers no opinion and it appears that the judgment *might* have

> rested upon a non-federal ground, this court will not take jurisdiction to review the judgment. * * * We are without jurisdiction when the existence of an adequate state ground is debatable."

As stated above the Supreme Court of Illinois in dismissing the writ of error rendered no opinion. But it is affirmatively demonstrated by the record that no *adequate* non-Federal ground could have been the basis for the action of the Supreme Court of Illinois in dismissing the writ of error and that it simply decided the Federal constitutional questions presented adversely to petitioners' contentions.

The possible grounds on which the court might have relied in dismissing the writ of error are stated in respondents' motion to dismiss the writ of error (Rec. 28). Paragraph 1 of that motion does not state any valid ground on which the Supreme Court of Illinois could have relied in view of its decision in *Altschuler* v. *Altschuler*, 410 Ill. 169, at 173-4 (Rec. 70-71), that a common law writ of error to review a judgment of the Appellate Court where a constitutional question has been injected into the case by the judgment of the Appellate Court need not be sued out within the 90-day limitation period established by Section 76 of the Civil Practice Act. Sec. 200, Ch. 110 (Ill. Rev. Stat. 1951) which governs in the case of ordinary appeals. No provision has been made by the Illinois legislature for the mode of prosecuting writs of error from the Appellate Court to the Supreme Court of Illinois under such circumstances. *Altschuler* v. *Altschuler*, 410 Ill. 169, at 173-4 (Rec. 70-71), [redacted] In the absence of any legislative enactment establishing a limitation period the only period applicable is the common law period of twenty years. *Peterson* v. *Manhattan Life Ins. Co.*, 244 Ill. 329, 334. The other non-Federal grounds advanced by that motion (a) any constitutional question was waived

because no constitutional question was raised in the trial court; (b) any constitutional question was waived by taking the case to the Illinois Appellate Court, Second District, errors being assigned of which that court had jurisdiction, and (c) were not raised in the Petition For Leave To Appeal to the Supreme Court of Illinois, are so inseparably tied up with the determination of the Federal constitutional points raised by the writ of error and by this Petition that they cannot be considered as being adequate non-Federal grounds.

There is a presumption against waiver of fundamental constitutional rights (*Johnson* v. *Zerbst*, 304 U.S. 464). This court has, of course, the ultimate determination as to whether the federal right asserted may be so lost, and whether, under the particular circumstances, it has been (*Parker* v. *Illinois*, 333 U.S. 571). Where a state court finds as a fact that a federal right has been waived or lost by estoppel this court is not bound by that ruling, but will analyze the facts for itself and reach its own conclusions as to their effect (*Truax* v. *Corrigan*, 257 U.S. 312, 324-325; *Union Pacific R. Co.* v. *Public Service Commission of Missouri*, 248 U.S. 67, 69-70; *Ward* v. *Board of County Com'rs*, 253 U.S. 17, 22-23; *Davis* v. *O'Hara*, 266 U.S. 314). Nor can the doctrine of whole or partial immunity of private charitable corporations from tort liability justify the dismissal of the writ of error as a non-Federal ground because any such rule is itself under attack on federal constitutional grounds.

QUESTIONS PRESENTED.

1. Whether the State of Illinois through the action of the Illinois Appellate Court in affirming the judgment of the trial court notwithstanding a verdict ripe for judg-

ment under the ordinary rules of tort liability applicable to all other private persons, individual or corporate, in that jurisdiction, coupled with the extinction of any possibility of further review by appeal within the State judicial system without fault on the part of petitioners, deprived petitioners of their personal security and property without due process of law and denied to them the equal protection of its laws in violation of their federal rights under Section 1 of the 14th Amendment to the Constitution of the United States?

2. Whether the State of Illinois in developing the common law policy of the State may exempt a private charitable corporation from judgment on a verdict ripe for judgment under the ordinary rules of tort liability applicable to all other private persons, individual and corporate, in that jurisdiction, such immunity being unknown to the common law of England on March 24, 1606, the date on which the statutes of England ceased to be the common law in Illinois and May 6, 1776, the date the Colony of Virginia declared its independence from England and July 4, 1776, the date of the Declaration of Independence and being unknown to the common law in America on July 28, 1868, the date the 14th Amendment to the Constitution of the United States went into effect, without depriving the plaintiff of his personal security and property without due process of law and denying to him the equal protection of its laws in violation of his federal rights under Section 1 of the 14th Amendment to the Constitution of the United States? At least where the plaintiff is a stranger to the institution?

3. Whether the State of Illinois in developing the common law policy of the State may exempt a private charitable corporation not presently possessed of non-trust property at the time of trial from judgment on a verdict ripe

for judgment under the ordinary rules of tort liability applicable to all other private persons, individual and corporate, in that jurisdiction, including private charitable corporations presently possessed of insurance or other non-trust property at the time of trial, without depriving the plaintiff of his personal security and property without due process of law and denying to him the equal protection of its laws in violation of his federal rights under Section 1 of the 14th Amendment to the Constitution of the United States? And where the plaintiff is a stranger to the institution?

4. Whether the State of Illinois in developing the common law policy of the State may set up as a test of liability of a defendant to judgment in an action in tort possession by the defendant at the time of trial of non-trust property subject to being taken to satisfy the judgment—a factor alien to any question of fault, damage, or right of satisfaction—without depriving the person to whose detriment the test is applied of his personal security and property without due process of law and denying to him the equal protection of its laws in violation of his federal rights under Section 1 of the 14th Amendment to the Constitution of the United States?

5. Whether the constitutional questions presented arose for the first time in the Illinois Appellate Court, Second District, upon extinction of any possibility of further review by appeal within the State judicial system without fault on the part of the petitioners, or were present in the trial court; and, if they were present in the trial court, whether they were waived by petitioners by failure to assert them in the trial court or by appealing to the Illinois Appellate Court in the first instance rather than to the Supreme Court of Illinois; which involves a further determination—whether the State of Illinois provides any ade-

quate means by which the common law policy of the State may be challenged or tested by or subjected to or governed by the requirements of Section 1 of the 14th Amendment to the Constitution of the United States?

6. Whether the State of Illinois acting through its judicial department deprived petitioners of their personal security and property without due process of law and denied them the equal protection of its laws in violation of their federal rights under Section 1 of the 14th Amendment to the Constitution of the United States by the action of the Supreme Court of Illinois in (a) dismissing the writ of error, (b) without a formal hearing such as other litigants are afforded, (c) without opinion, (d) on a motion filed, entertained, and allowed in violation of its own rules, (e) after granting petitioners an extension of time in which to file abstracts and briefs which time would not expire until after the term at which the order of dismissal was entered; (f) in refusing to vacate the order of dismissal on a motion filed or presented for filing within thirty days after the order of dismissal was entered; and (g) in refusing to set aside a void order of dismissal at any time?

THE RULE OF DECISION IN ILLINOIS.

The Act of March 5, 1874, provided

"That *the common law of England*, so far as the same is applicable and of a general nature, and all statutes or acts of the British parliament made in aid of, and to supply the defects of the common law, prior to the fourth year of James the First [beginning March 24, 1606 and ending March 23, 1607], excepting the second section of the sixth chapter of 43rd Elizabeth, the eighth chapter of 13th Elizabeth, and ninth chapter of 37th Henry Eight, and

which are of a general nature and not local to that kingdom, *shall be the rule of decision*, and shall be considered as of full force until repealed by legislative authority." (Italics ours). Ch. 28, Ill. Rev. Stat. 1951.

WRIT OF ERROR IN ILLINOIS.

A common law writ of error is a new suit in Illinois, *Freeson* v. *Scott County Drainage & Levee District*, 283 Ill. 536. The assignments of errors are the pleadings. *Freeson* v. *Scott County Drainage & Levee District*, 283 Ill. 536. It has been abolished as a method of review in the ordinary civil proceeding and review by notice of appeal substituted. Sec. 74 Civil Practice Act, Sec. 198, Ch. 110 Ill. Rev. Stat. 1951. But "the rule is well settled that where a constitutional question first arises in the Appellate Court" the Supreme Court of Illinois "has jurisdiction to review the judgment of the Appellate Court, on writ of error. This rule has not been changed by the Practice Act." *Cummings-Landau Laundry Machinery Co.* v. *Koplin*, 386 Ill. 368, 373; *Sprague* v. *Goodrich*, 376 Ill. 80, 87. This review is mandatory. *Altschuler* v. *Altschuler*, 410 Ill. 169. The ninety day limitation on the right to appeal does not apply to a writ of error under such circumstances. *Altschuler* v. *Altschuler*, 410 Ill. 169. In the absence of legislation the limitation period is twenty years. *Peterson* v. *Manhattan Ins. Co.*, 244 Ill. 329, 334.

LIABILITY AND IMMUNITY OF PRIVATE CHARITABLE CORPORATIONS IN ILLINOIS.

Under the decisions of the Supreme Court of Illinois a private charitable corporation is subject to tort liability when it has insurance or other non-trust funds. *Moore* v. *Moyle,* 405 Ill. 555. In that case, the latest decision in Illinois on the question, the court declared: "From a careful analysis of the many cases, we are of the opinion that the law in Illinois is that *the trust funds of charitable corporations are immune from liability* for the torts of the corporation's employees and agents. *Beyond that, the rule of respondeat superior is in effect.*" It would seem to follow that a charitable corporation is liable to judgment in an action in tort but that its trust funds cannot be taken to satisfy the liability. But the Illinois Appellate Court, Second District, held in the instant case that it is not subject to liability when all of its assets are trust funds. *Slenker* v. *Gordon,* 344 Ill. App. 1. If that decision correctly states the Illinois law on the subject, it follows that judgment is limited to the amount of non-trust property in the possession of the charitable corporation at the time of trial. It further follows that a charitable corporation having no non-trust property is only subject to tort liability when and to the extent it carries liability insurance, i.e., voluntarily subjects itself to tort liability.

STATEMENT.

The facts and proceedings in the trial court are simply stated in the opinion of the Illinois Appellate Court (Rec. 6). Petitioners, Fred Slenker, and his wife, Elizabeth Slenker sued David W. Gordon and the Grand Lodge of the State of Illinois of the Independent Order of Odd Fellows to recover for personal injuries sustained by them on February 21, 1945, in a collision between their automobile and an automobile driven by Gordon. That suit was filed on May 19, 1945. The complaint was amended and a severance granted the defendant Gordon. It alleged that Gordon was at and before the time of the collision, the officer, agent and servant of the corporate defendant and alleged that the corporate defendant, through its said officer, agent and servant, Gordon, was guilty of the several acts of alleged negligence. The defendant in its answer averred that it was a charitable organization organized under a special act of the Legislature of the State of Illinois; that all of its objects and service were wholly charitable and as such it was not liable in anywise for the torts of Gordon or any of its servants. A reply was filed by the petitioners and, after the issues had been made up, a jury trial was had, resulting in a verdict finding the corporate defendant guilty and assessing the damages of petitioner, Fred Slenker, at $8,000.00 and assessing the damages of the petitioner, Elizabeth Slenker, at $16,000.00.

The jury, in addition to these general verdicts, also answered in the affirmative this special interrogatory, viz.: Was David W. Gordon at the time of the collision in question, in driving and operating his automobile, acting as an agent or servant of the defendant, Grand Lodge of the State of Illinois of the Independent Order of Odd Fellows, a corporation, and in the scope of his employment?

Thereafter the motion of the corporate defendant for a new trial was denied but its motion for judgment notwith-

standing the verdict was sustained, the trial court holding that defendant was a charitable organization and as such immune from tort liability. Judgment was rendered in favor of the corporate defendant and against petitioners in bar of the action and for costs. To reverse this judgment petitioners appealed to the Illinois Appellate Court, Second District (Rec. 142).

Appeal.

The Appellate Court held that the Grand Lodge is a charitable corporation (Rec. 17). The court said:

> "The appellee pleaded in its answer the defense that it was a charitable organization, that all its objects and service were wholly charitable and as such it was not liable for the torts of any of its agents and servants. The facts with reference to the funds of appellee were brought out in the evidence presented at the trial. The record in this case shows that appellee is a charitable organization and that all of the funds of the Grand Lodge of the State of Illinois of the Independent Order of Odd Fellows are trust funds devoted to the purposes of the Independent Order of Odd Fellows. This brings the case within the rule of the *Parks* case [*Parks* v. *Northwestern University*, 218 Ill. 381, 75 N.E. 991, 993, 2 L.R.A., N.S., 556] that the trust funds of a charitable institution must be protected. *Moore* v. *Moyle, supra* [*Moore* v. *Moyle*, 405 Ill. 555, 92 N.E. 2d 81], does not overrule the *Parks* case, but reaffirms the principles laid down in it. The trial court therefore properly entered judgment for the defendant notwithstanding the verdict and that judgment must be affirmed. In view of this conclusion, it is unnecessary to consider the other errors relied upon or the assigned cross-errors" (Rec. 24).

Petitioners filed a motion in the Appellate Court in proper time for a certificate of importance which, if granted, would automatically send the case to the Supreme Court of Illinois (Sec. 75, Civil Practice Act and Rules of Supreme Court [of Illinois], 1951) (Sec. 75 (2a), Ch. 110,

Ill. Rev. Stat. 1951). It was denied (Rec. 25-26). Petitioners next filed a motion in proper time in the Appellate Court for a certificate that the jurisdictional amount—$1,500.00—was involved (Sec. 75, Civil Practice Act and Rules of Supreme Court [of Illinois] 1951) (Sec. 199, Ch. 110, Ill. Rev. Stat. 1951), which was allowed (Rec. 26), and in proper time filed a petition with the Supreme Court of Illinois for leave to appeal (Rec. 27). It was denied (Rec. 27).

Petitioners then sued out a writ of error in the Supreme Court of Illinois on state and federal constitutional grounds (Rec. 1, 206), under the authority of *Altschuler* v. *Altschuler*, 410 Ill. 169, at 173-174.

Writ of Error.

This was the *first* time any constitutional question was raised in the case. The assignment of errors on writ of error alleged, in brief, that the trial court erred in entering the judgment notwithstanding the verdict and the Appellate Court erred in affirming that judgment and "coupled with the extinction of any possibility of correcting said errors by appeal" the State of Illinois had deprived plaintiffs of their fundamental right to have judgment entered on the verdict when the verdict was ripe for judgment thus depriving them of their personal security and property without due process of law and denied them the equal protection of its laws in violation of their federal rights under the 14th Amendment to the Constitution of the United States and that "any rule devised or applied by the courts of this state clothing a corporation organized for charitable purposes and not for profit with whole or partial immunity (a) to suit or (b) to judgment * * * in tort", would have the same result (Rec. 300, 302, 304).

Petitioners specifically pointed out "The Appellate Court erred in holding that because 'the trust funds of a

charitable institution must be protected, the trial court *therefore* properly entered judgment notwithstanding the verdict and that judgment must be affirmed", and in holding that a charitable corporation "*itself* is ever immune from judgment", and "it is necessary for the plaintiff to prove a defendant has non-trust property from which to pay a judgment before a judgment can be entered" (Rec. 300-301).

SPECIFICATION OF ERRORS.

1. The Supreme Court of Illinois erred in dismissing the writ of error and in refusing to vacate the order of dismissal.

2. The trial court erred in not entering judgment for plaintiff on the verdict.

3. The trial court erred in allowing defendant's motion for a directed verdict and for judgment notwithstanding the verdict.

4. The Appellate Court erred in affirming the judgment for defendant notwithstanding the verdict.

5. The trial court erred in holding that the doctrine of *respondeat superior* has no application to a corporation organized for charitable purposes and not for profit.

6. The trial court erred in holding that a corporation organized for charitable purposes and not for profit is not liable for torts committed by its employees or agents within the scope of their employment.

7. The Appellate Court erred in holding that because "the trust funds of a charitable institution must be protected" that "the trial court *therefore* properly entered judgment notwithstanding the verdict and that judgment must be affirmed".

8. The Appellate Court erred in holding that it is necessary for the plaintiff to prove a defendant has non-trust property from which to pay a judgment before a judgment can be entered in favor of a plaintiff in an action in tort against a corporation organized for charitable purposes and not for profit.

9. The Appellate Court erred in holding that a corporation organized for charitable purposes and not for profit *itself* is entitled to any immunity from tort liability whatsoever.

10. The Appellate Court erred in holding that a corporation organized for charitable purposes and not for profit *itself* is ever immune from judgment in an action in tort.

11. The Appellate Court erred in holding that payment of a judgment in a tort action from the trust property of a corporation organized for charitable purposes and not for profit would divert it from the purposes of the corporation.

12. The trial and Appellate Courts erred in holding that the record in this case shows that the defendant is a corporation organized for charitable purposes and not for profit.

13. The trial and Appellate Courts erred in holding that all of the property owned by the Grand Lodge of the State of Illinois of the Independent Order of Odd Fellows is trust property.

14. The Appellate Court erred in holding that evidence as to the manner in which property was held by defendant introduced for the purpose of determining whether defendant was a corporation organized for charitable purposes and not for profit could be used for the purpose of determining whether defendant owns any non-trust property.

15. That by reason of each of the errors committed by the trial and Appellate Courts as above specified, coupled with the extinction of any possibility of correcting said errors by appeal by the Appellate Court denying an application for a certificate of importance and the Supreme Court denying a petition for leave to appeal, the State of Illinois acting through its judicial department has deprived plaintiffs of their constitutional rights as hereinafter specified:

It has deprived the plaintiffs of their fundamental right to have judgment entered on the verdict when the verdict is ripe for judgment, in violation of Section 1 of the 14th Amendment to the Constitution of the United States, which provides that no state shall deprive any person of life, etc. person; or deny to any person within its jurisdiction the equal protection of its laws.

16. That the State of Illinois through the action of the Illinois Appellate Court in affirming the judgment of the trial court notwithstanding a verdict ripe for judgment under the ordinary rules of tort liability applicable to all other private persons, individual or corporate, in that jurisdiction, coupled with the extinction of any possibility of further review by appeal within the state judicial system without fault on the part of petitioners, constituted action by the State of Illinois depriving petitioners of their personal security and property without due process of law and denying to them the equal protection of its laws in violation of their federal rights under Section 1 of the 14th Amendment to the Constitution of the United States.

17. That the State of Illinois in developing the common law policy of the state in exempting to any extent a private charitable corporation from judgment on a verdict ripe for judgment under the ordinary rules of tort liability applicable to all other private persons, individual and cor-

porate, in that jurisdiction, and unknown to the common law of England on March 24, 1606, and May 6, 1776, and July 4, 1776, and the common law in America on July 28, 1868, has deprived petitioners of their personal security and property without due process of law and denied to them the equal protection of its laws in violation of their federal rights under Section 1 of the 14th Amendment to the Constitution of the United States especially since they were strangers to the institution.

18. That the State of Illinois in exempting the Grand Lodge of the State of Illinois of the Independent Order of Odd Fellows, a private charitable corporation not presently possessed of non-trust property at the time of trial from judgment on a verdict ripe for judgment under the ordinary rules of tort liability applicable to all other private persons, individual and corporate, in that jurisdiction, including private charitable corporations presently possessed of insurance or other non-trust property at the time of trial, deprived petitioners of their personal security and property without due process of law and denied to them the equal protection of its laws in violation of their federal rights under Section 1 of the 14th Amendment to the Constitution of the United States.

19. That the State of Illinois in developing the common law policy of the state had no right to set up as a test of liability of the Grand Lodge of the State of Illinois of the Independent Order of Odd Fellows to judgment in an action in tort possession by the corporation at the time of trial of non-trust property subject to being taken to

satisfy the judgment—a factor alien to any question of fault, damage, or right of satisfaction—and in applying the test to the petitioners' detriment deprived petitioners of their personal security and property without due process of law and denied to them the equal protection of its laws in violation of their federal rights under Section 1 of the 14th Amendment to the Constitution of the United States.

20. That the constitutional questions presented arose for the first time in the Illinois Appellate Court, Second District, upon extinction of any possibility of further review by appeal within the state judicial system without fault on the part of petitioners—contrary to the implied decision of the Supreme Court of Illinois that it did not—especially in view of the fact that the State of Illinois does not provide any adequate means by which the common law policy of the state may be challenged or tested or subjected to or governed by the requirements of Section 1 of the 14th Amendment to the Constitution of the United States relative to due process and the equal protection of the laws; and, as a consequence the Supreme Court of Illinois under its decision in *Altschuler* v. *Altschuler,* 410 Ill. 169, at 173-174, holding that a writ of error to review cases on constitutional grounds arising for the first time in the Illinois Appellate Courts was a matter of right without time limitation other than that applicable at common law to writ of error, i. e., twenty years, had no discretion in the matter but was required to hear the case and sustain the writ and erred in dismissing the writ of error thereby exhausting all possibility of further review in the state

judicial system and terminating any possibility of remedy in that state, the State of Illinois thereby depriving petitioners of their personal security and property without due process of law and denying to them the equal protection of its laws in violation of their federal rights under Section 1 of the 14th Amendment to the Constitution of the United States.

21. That the State of Illinois acting through its judicial department deprived petitioners of their personal security and property without due process of law and denied them the equal protection of its laws in violation of their federal rights under Section 1 of the 14th Amendment to the Constitution of the United States by the action of the Supreme Court of Illinois in (a) dismissing the writ of error, (b) without a formal hearing such as other litigants are afforded, (c) without opinion, (d) on a motion filed, entertained, and allowed in violation of its own rules, (e) after granting petitioners an extension of time in which to file abstracts and briefs which time would not expire until after the term at which the order of dismissal was entered, (f) in refusing to vacate the order of dismissal on a motion filed within thirty days after the order of dismissal was entered, and, (g) in refusing to set aside a void order at any time.

Reasons Relied On for Allowance of Writ.

I.

The State of Illinois provides no means by which the common law policy of that state may be challenged or tested or governed by or subjected to the Fourteenth Amendment.

It has long been recognized that the action of state courts in enforcing a substantive common-law rule formulated by those courts, may result in a denial of rights guaranteed by the Fourteenth Amendment. *Shelley* v. *Kraemer*, 334 U.S. 1, 14-18. It follows that the state courts must provide some method by which the substantive common-law rules formulated by the state courts may be challenged or tested or governed by or subjected to the Fourteenth Amendment. The issues here are similar to the issues in that case except there the state supreme courts rendered opinions and enforced the common law rule complained of while here the Supreme Court of Illinois rendered no opinion and simply refused to disturb the decision of the Appellate Court. Review "on the question of constitutionality of procedure or result must be permitted when fundamental rights are involved." *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U.S. 287 at 289. Mott, Due Process, p. 239 n. 67. And if the state courts do not do so it is incumbent upon this Court to review the case.

But the State of Illinois provides no adequate means by which the common-law policy of the state may be challenged or tested or governed by or subjected to the 14th Amendment. This is shown by a consideration of the action of the Supreme Court of Illinois in dismissing the writ of error on motion in the instant case and decisions of that court in other cases, especially *Moore* v. *Moyle*, 399 Ill. 250, 405 Ill. 555; *McIlvaine* v. *City Nat. Bank*, 371 Ill.

565; and *Hass Electric Co.* v. *Amusement Park Co.*, 236 Ill. 452.

In *Moore* v. *Moyle*, 399 Ill. 230, the plaintiff Moore took a direct appeal to the Supreme Court of Illinois on the ground that the common law rule of that state granting immunity to tort liability to charitable corporations violated her federal rights under the due process and equal protection clauses of the 14th Amendment when applied to prevent her from maintaining an action based on *respondeat superior* against a charitable corporation. The constitutional question was raised in the trial court by a timely motion to vacate an ORDER striking the complaint. The court held that no constitutional question was presented and transferred the cause to the Appellate Court of Illinois for determination. The court said:

> "Where a judgment or decree is attacked on the grounds that its enforcement will deprive the one against whom it is sought to be enforced of some constitutional right no constitutional question is presented which authorizes a direct appeal to this court. The question involved in such a case is the validity of the judgment or decree and *is not a constitutional question* within the meaning of the statute which authorizes a direct appeal to this court * * * *The issue is rather the correctness or incorrectness of the order and judgment of the trial court.* Of this we have no jurisdiction on direct review." (Italics ours.)

On subsequent appeal to the Supreme Court of Illinois on a certificate of importance from an adverse Appellate Court ruling counsel argued at page 74 of the Brief and Argument of Appellant (Rec. 66):

> "This court [Supreme Court of Illinois] held when plaintiff sought to have the decision of the lower court reviewed directly by this court that no constitutional question was involved 'within the meaning of the statute which authorizes appeals direct to this court.' *Moore* v. *Moyle*, 399 Ill. 230. But this court did not

> decide whether plaintiff was deprived of her constitutional rights. That question remains to be determined."

In the opinion in *Moore* v. *Moyle*, 405 Ill. 555, the decision on that second appeal the court in answering that contention made only the following comment, concerning the constitutional issues:

> "From that judgment appellant came here on direct appeal contending constitutional questions were involved. This court found no fairly debatable constitutional questions were presented and ruled on in the trial court, so as to give this court jurisdiction on direct appeal, and that the question presented was whether the judgment of the trial court was correct. *Moore* v. *Moyle*, 399 Ill. 230, 77 N.E. 2d 651."

It appears that the phrase "within the meaning of the statute which authorizes appeals direct to this court" adds nothing to the statement "is not a constitutional question."

In *People ex rel. Tinkoff* v. *Northwestern University*, 396 Ill. 233; *Chapralis* v. *City of Chicago*, 389 Ill. 269; *In re Paus' Estate*, 385 Ill. 550; *Perlman* v. *Thomas Paper Stock Co.*, 378 Ill. 238; and *De LaCour* v. *De LaCour*, 363 Ill. 545; the court reached the same conclusion as it reached in *Moore* v. *Moyle*, 399 Ill. 230.

The *ratio decidendi* has been clearly stated by the Supreme Court of Illinois: "If error was committed by the circuit court it can be *corrected* in the Appellate Court." *Riddlesbarger* v. *Riddlesbarger*, 410 Ill. 392. Or as it said in *McIlvaine* v. *City Nat. Bank and Trust Co.*, 371 Ill. 565; and *In re Paus' Estate*, 385 Ill. 550:

> "If errors are committed or erroneous or unjust decisions are rendered they may be *corrected* in the manner provided by law for the *correction* of such errors, but *mere* error in a judgment or decree does

not deprive the losing party of the benefit of due process of law. *Foreman-State Nat. Bank* v. *Sistek*, 35 525, 193 N.E. 513."

(Italics in above paragraph ours.)

It follows that in Illinois no constitutional question can arise in either the trial or appellate courts as to the validity of a rule of common law (as distinguished from a statutory enactment) as long as there is a possibility to appeal the case within the state judicial system. Until the possibility of further appeal is extinguished the issue is the correctness or incorrectness of the decision of the trial court or the Appellate Court. Until that happens there is nothing except "*mere error*" that may be corrected in the manner provided by law for the correction of such errors.

The holdings of the Supreme Court of Illinois that no constitutional question arises in a case at common law until all possibility of appeal is extinguished is consistent with the manner in which the common law of the State of Illinois and the common law of any other common law jurisdiction is developed. Until the highest court in the state has declared the common law policy of the state the declaration of what the common law of that particular jurisdiction is merely tentative. It is not law until all possibility of appeal to the highest court of the state has been exhausted. And then it only becomes the law of the land as distinguished from being the law of the case to the extent it does not conflict with decisions made by the Supreme Court of the state. Only when the decision becomes final in the sense that further appeal within the state judicial system is impossible has there been or can there be any deprivation of right as far as the litigant is concerned in a permanent sense. If he does not exhaust all possible methods of obtaining review by appeal he

acquiesces in the judgment and waives his constitutional rights.

As a practical matter it makes little difference when the courts of a state determine when a constitutional question arises for the first time provided that the courts consistently apply the same rule. But the judicial system of a state should be required to uniformly apply the same rule in all cases. There is no doubt that a constitutional question arises in the trial court when a statute is involved because that declaration of law is not subject to change at the whim of the judiciary. But in the case of a rule at common law it is subject to change by judicial decision. The courts of the State of Illinois could have adopted the view that a constitutional question arose in the trial court. But they have not done so and the distinction between the nature of a statute and the position of the courts in regard thereto and the nature of a common law rule and the position of the courts in regard thereto may justify the courts in declaring a different rule in regard to when the court's constitutional question arises as a result of their enforcement. And having once adopted a rule as to when a constitutional question arises as a result of the enforcement of a common law rule which is different from that applicable to the enforcement of a statute it must be adhered to. And if it is, no one can make any justifiable complaint concerning it.

But the Supreme Court of Illinois has developed another rule that must be considered. It has repeatedly held that if a case is taken directly to the Appellate Court and there are questions other than the constitutional questions raised of which that court has jurisdiction the constitutional questions are waived. *Hass Electric Co.* v. *Amusement Park Co.*, 236 Ill. 452; *Luken* v. *Lake Shore & Michigan S. Ry. Co.*, 248 Ill. 377. These are the cases cited by

respondents in their suggestions to their motion to dismiss the writ of error (Rec. 36) and in the absence of any opinion must be taken to be the basis on which the Supreme Court of Illinois acted in dismissing the writ of error and in refusing to vacate the order of dismissal in view of the fact, as has been shown, that the writ of error was not barred by limitations.

The application of the two rules in the instant case shows precisely what happens: on direct appeal no constitutional question is involved: on indirect appeal the constitutional question is waived. Under such circumstances it would be an idle gesture (as it was in *Moore* v. *Moyle*, 399 Ill. 230, 405 Ill. 555) to make any contention in the trial court that a rule declared by the Supreme Court of the State of Illinois to be the common law of that jurisdiction is unconstitutional. Consequently, no attack can successfully be made [redacted] against a common law rule of the State of Illinois on constitutional grounds, and the common law policy of the state for all practical purposes is unfettered by constitutional limitations.

There are only two ways in which that result can be avoided: (a) to hold that the constitutional question arises for the first time in the Appellate Court when all possibility of further appeal is exhausted, or (b) to hold that the constitutional question arises in the trial court. But it is absolutely impossible to avoid the result reached in the instant case as long as the Supreme Court of Illinois holds that no constitutional question is present while there is a possibility of appeal on the one hand, thus barring direct appeal to the Supreme Court of Illinois, and that by taking the case to the Appellate Court in the first instance the litigant waives the constitutional questions, thus barring their ultimate determination on the other.

It is submitted that the law in Illinois concerning constitutional questions is as badly muddled as its criminal

procedure with which the Court has had occasion to be familiar. The Petition for Writ of Certiorari should be granted and the Supreme Court of Illinois and the State of Illinois be required to provide for adequate review of the common law policy of the state when such policy is challenged on federal constitutional grounds. The matter is one of national importance.

The means is at hand. The two lines of cases indicated can only be reconciled on the hypothesis that no constitutional question is presented by a case involving the common law policy of the state in either the trial or intermediate Appellate Court until all possibility of further appeal to the state court of last resort is extinguished. If that view be adopted it would follow that the constitutional questions in the instant case arose when without any fault on the part of petitioners all chance of correcting the errors committed by the trial and appellate courts was extinguished by the concurrent action of the Appellate Court and the Supreme Court of Illinois in closing the road to further review by appeal. Of course denial of a certificate of importance and denial of leave to appeal did not constitute the denial of any constitutional right since the issuance of a certificate of importance or the granting of leave to appeal is entirely a matter of judicial discretion. But that denial extinguished all possibility of correcting the errors by appeal and acted as a catalyst whereby the action of the trial court and of the Appellate Court became the final action of the courts of the State of Illinois and the State of Illinois as to common law policy and a denial of constitutional right by the courts of the State of Illinois and the State of Illinois.

The Illinois rule being well settled that where a constitutional question first arises in the Appellate Court the Supreme Court of Illinois has jurisdiction to review the

judgment of the Appellate Court on writ of error (*Cummings-Landau Laundry Machinery Co.* v. *Koplin*, 386 Ill. 368; *Goodrich* v. *Sprague*, 376 Ill. 80; *Corcoran* v. *City of Chicago*, 373 Ill. 567; *Burket* v. *Reliance Bank and Trust Co.*, 366 Ill. 120; *Segal* v. *Chicago City Railway Co.*, 325 Ill. 43) even after 90 days (*Altschuler* v. *Altschuler*, 410 Ill. 169, 173-174) the solution suggested would solve the procedural difficulty.

The problem is worthy of the consideration of this Court and a decision by this Court would tend to correct similar situations in other states than Illinois having intermediate Appellate Courts of limited jurisdiction to decide constitutional questions.

II.

Fairly debatable federal constitutional questions of importance involving fundamental rights of the individual are presented for decision which this Court alone has the ultimate power to decide and the determination of which will effect the law of about thirty-two states which hold that under the common law policy of the state private charitable corporations are entitled to full or limited immunity to judgment in an action in tort under circumstances in which any other private person, individual or corporate, would be liable to judgment.

Fairly debatable federal constitutional questions are presented for decision (Rec. 206, 307). These are important because they involve fundamental rights of the individual (Rec. 60-65). This Court alone has the ultimate power to decide them. Their determination will affect the law of about thirty-two states which hold that under the common law policy of the state private charitable corporations are entitled to full or limited immunity to judgment in an action

in tort under circumstances in which any other private person, individual or corporate, would be liable to judgment (Rec. 47-59). A decision by this Court would be a landmark case tending to establish just how far a state may go in exempting any person from the ordinary rules of tort liability as a part of the common law policy of the state without violating the constitutional rights of the complainant under the 14th Amendment to the Constitution of the United States.

III.

Immunity of a private corporation to judgment in an action in tort is without foundation in the common law and bars the enforcement of fundamental rights and requires an injured person who otherwise would be entitled to judgment under the ordinary rules of tort liability applicable for or against all other private persons, individual or corporate, in the same circumstances to make an unreasonable contribution to the charitable corporation against his will and is most unreasonable when applied against a stranger to the institution or when immunity is limited to corporations not presently possessed of insurance or other non-trust property. The State of Illinois, therefore, in enforcing any immunity to judgment deprives an injured person of his fundamental right to personal security and property without due process of law and denies to him the equal protection of its laws in violation of the Fourteenth Amendment.

A. Immunity has no foundation in the common law.

The idea that a corporation is to be treated as a natural man is the only theory about the personalty of corporations that the common law has ever possessed. Holdsworth states: "The idea that the corporation is to be treated as

far as possible like a natural man is the only theory about the personalty of corporations that the common law has ever possessed." (History of English Law, 3rd. Ed., Vol. 9, p. 70): "So far as criminal or civil liability is concerned, the courts have always been prepared to hold that a corporation is as capable of being held liable as a natural person." (Ibid. pp. 51-52). Blackstone says that every corporation has the power "To sue or be sued * * * as natural persons may"; and that power is "inseparably incident to every corporation and of course tacitly annexed." (Bernard C. Gavit, Blackstone's Commentaries on The Law, pp. 211-212; 208-210). Holdsworth says: "It was well recognized that the king's charter could neither change the common law, nor alter the rights and duties of private persons fixed by law. To hold, therefore, that the king could neither give nor take away powers from a corporation which he could not give or take away from a natural man, was quite in accordance with the constitutional doctrine. But, if this was so, it followed that those powers and capabilities were not only incidental, they were also inseparately annexed." (Holdsworth, History of English Law, 3rd Ed., Vol. 9, p. 55). In general "the rights, powers, and liabilities of the corporations are, as far as they exist, identical with those of the man." Joel Prentiss Bishop, Non-Contract Law (1889), pp. 332-333, Holdsworth says: "The *common law*, without indulging in much speculation as to the nature of a corporation's personalty, has evolved the *common sense view* that a corporation has, so far as is consistent with its artificial nature and with the purpose with which it is created, the capacities and *liabilities* of a *natural man*." Holdsworth's Essays in Law and History, pp. 211-212. (Italics ours.) "The treatment is consonant with popular ideas and speech wherein corporate bodies are freely personified." It has been accomplished "by the simple extension of the legal principles of agency." Encyclopedia

Britannica, 14th Ed., Vol. 6, p. 464. "If it is once granted", said Lord Lindley in his decision in *Citizens Life Assurance Co.* v. *Brown* (1904), A.C. 423, 426, "that corporations are for civil purposes to be regarded as persons, i.e., as principals acting by agents and servants, it is difficult to see why the ordinary doctrines of agency are not to be applied to corporations as well as ordinary individuals." The maxim, *respondeat superior*, is founded on the principle that every man in the management of his own affairs, whether by himself or his servants, shall so conduct himself as not to injure another. *Harding* v. *St. Louis Stockyards*, 242 Ill. 444. The master is not liable because of the authority given to the servant nor because the servant had been negligent, "But because he is conducting the master's affairs, and the master is bound to see that his affairs are so conducted that others are not injured." In other words, the rule is based on a "great principle of social duty", adopted "from general considerations of policy and security." Chief Justice Shaw in *Farwell* v. *Boston & Worcester R.R. Corp.*, 4 Metcalf 49, quoted with approval in *Standard Oil Co.* v. *Anderson*, 212 U. S. 215. In *Nevins* v. *City of Peoria*, 41 Ill. 502, Mr. Justice Lawrence said:

> "In our opinion, the theory that private rights are ever to be sacrificed to public convenience or necessity, without full compensation, is fraught with danger and should find no lodgment in American jurisprudence. To prevent this was the object of some of the most important of our constitutional guarantees. [Unless] protection [is found] in the courts our institutions have failed in their great purpose—the complete security of private rights * * * if an individual, exercising his lawful powers, commit an injury, the action on the case is the familiar remedy; if corporations acting within the scope of their authority should work ill to another, the same principle of *ethics* demands of them to repair it, and no reason occurs to the court why

the same remedy should not be applied to compel justice from them." (Italics ours.)

Charitable corporations are private if the foundation is private. "This is the unequivocal doctrine of the authorities; and cannot be shaken but by undermining the most solid foundations of the common law." *Dartmouth College* v. *Woodward,* 4 Wheat. (U.S.) 518, 670 (Mr. Justice Story); *Washington Home* v. *City of Chicago,* 157 Ill. 414. It follows that such a corporation is a private and not a public person.

The common law did not except a private charitable corporation from these general rules (Rec. 52-57). It is plain that the rule that a corporation should be treated as a natural person was first applied to a corporation organized for charitable purposes and not for profit (Rec. 52) and an abbott, a monastic corporation sole and consequently a charitable corporation, was liable for the torts of his monks as early as 1485 (Y.BB 48 Edward III, Mich. pl. 10; 49 Edward III, Mich. pl. 5; Holdsworth, History of English Law, 3rd Ed., Vol. 3, pp. 471, 473-4, 488; Pollock and Maitland, History of English Law, 2nd. Ed., Vol 1, 433, 438, 435-6; Rec. 53-55). Since the abbott was a monk (Rec. 53) he was civilly dead (Rec. 53) and was propertyless (Rec. 54) it follows that his liability for the torts of his monks was against him in his corporate capacity and was satisfied out of the assets of the monastic corporation (Encyclopedia Americana, 1942 Ed., Vol. 1; Pollock and Maitland, History of English Law, 2nd Ed., Vol. 1, pp. 433, 492) (Rec. 55). Consequently charitable corporations were liable in tort. This conclusion is confirmed by the development of the common law in England (1866) (Rec. 56), New Brunswick (1890), Ontario (1915), and New Zealand (1935) (Rec. 55) and in seventeen American jurisdictions: Rhode Island (1879), New Hampshire (1906), Alabama (1915), Minne-

sota (1920), New York (1937), California (1939), Utah (1940), Oklahoma (1940), Florida (1940), District of Columbia (1942), North Dakota (1946), Puerto Rico (1948), Vermont (1950), Iowa (1951), Arizona (1951), Delaware (1951), and Mississippi (1951) (Rec. 56-58); and by decisions in eleven American jurisdicitions: Michigan (1907), Indiana (1909), Virginia (1914), Nebraska (1918), North Carolina (1929), Nevada (1929), Ohio (1930), Connecticut (1931), Louisiana (1934), Washington (1940), and New Jersey (1948) (Rec. 58-59) holding the charitable corporations liable to strangers, Contract or implied contract being the basis on which non-liability to beneficiaries is predicated; and as far as liability to judgment is concerned by decisions in two other American jurisdictions, Tennessee and Colorado (Rec. 47-48).

B. Immunity bars the enforcement of fundamental rights and requires the person injured to make a contribution to the charitable corporation against his will.

"Every man's person is sacred." Bernard C. Gavit, Blackstone's Commentaries, 556-559. It follows that the right of personal security is an absolute right, inherent and inalienable, which does not need to be sacrificed by the laws of society to public convenience and avails against all persons whomsoever. Bernard C. Gavit, Blackstone's Commentaries on The Law, pp. 68-71; *The Wabash, St. Louis and Pacific Railway Company* v. *Shacklet* (1883), 105 Ill. 364, 379. "Every man has a property right in his own person." Walter H. Hamilton, Property According to Locke, 1932, 44 Yale L.J. 864; Selected Essays on Constitutional Law, Vol. 2, pp. 115, 119. It follows that one of the primary rights of a citizen is indemnity against personal injuries occasioned by the negligence of others, i.e., redress in the ordinary forms of law—vindication by the regular administration of justice in the courts of law—and that

this right of indemnity avails against all persons whomsoever. Bernard C. Gavit, Blackstone's Commentaries on The Law, pp. 76, 556-559; *The Wabash, St. Louis and Pacific Railway Company* v. *Schacklet* (1883), 105 Ill. 364, 379; *Prouty* v. *City of Chicago*, 250 Ill. 222.

Immunity bars the enforcement of these rights. It compels "the persons damaged to contribute the amount of their loss to the purpose of the * * * corporation" (*Mulliner* v. *Evangelischer Diakonniessenverein*, 144 Minn. 392, 397-8), which is "*an unreasonable contribution to the charity, against his* [*their*] *will*," (*Silva* v. *Providence Hospital of Oakland*, 14 Cal. (2d) 762, 775-776) for "No conception of justice demands that an exception to the rule of *respondeat superior* be made in favour of the resources of a charity and against the person of a beneficiary [or other person] injured by the tort of a mere servant or employee functioning in that character." *Sheehan* v. *North Country Community Hospital* (1937), 273 N.Y. 163, 164, and "If beneficiaries and servants of charities, and third persons, are killed or injured, or their property injured or destroyed, and no recompense is given from any source, the result is apt to be that a certain number of persons will become public charges and a feeling of social injustice will be implanted in the minds of the victim." (Bogert, Trusts and Trustees, ... Ed., Vol. 2, Sec. 401). It is "an anomaly" which is gradually being broken down and "this leaves the steps untaken [to abolish it] as the more anomalous." *President and Trustees of Georgetown College* v. *Hughes* (1942), 130 F. 2d 810, 814-15. It is invidious and mischievous.

C. Immunity is most unreasonable when applied against a stranger to the institution or when immunity is limited to corporations not presently possessed of insurance or other non-trust property.

It is particularly unreasonable when applied against a stranger to the institution. In *Henry W. Putnam Memorial Hospital* v. *Allen*, 34 F. 2d 927, 929-30 (C.C.A. 2d Vt.), the court said: "irresponsibility should not be extended to the tortious infliction of damage upon strangers. To hold that a charitable institution, whose agent negligently runs down a pedestrian upon the street, need not respond in damages, although the circumstances are such as would render any other defendant liable, seems to us *a monstrous doctrine* [Italics ours]. * * * in our opinion no adequate reason has been, or can be, advanced for allowing the purpose of the settlor of trust funds to introduce into the law a principle which to us, appears so anomalous and unjust." That it is particularly unreasonable in such a case is shown by the fact eleven American jurisdictions which erroneously enforce immunity against beneficiaries permit recovery by a stranger (Rec. 58-59).

It seems particularly unreasonable to recognize any immunity where the State has already held that a private charitable corporation having liability insurance coverage or possessed of other non-trust property is subject to judgment as Illinois did in *Moore* v. *Moyle*, 405 Ill. 555. In such case the argument for granting immunity is even more specious than the argument for granting immunity in all cases. The reasoning of the Illinois Appellate Court's opinion in this case (Rec. 6-24) with particular reference to the last four paragraphs of the opinion (Rec. 23-24) is logically unsound. The court presupposes that if a judgment were rendered the trust property would be taken on execution to satisfy the judgment and since the Supreme Court of Illinois has held that the trust assets must be protected it follows that the judgment cannot be entered. But that is not true, it does not follow that because a judgment is rendered that the judgment creditor is entitled to execution. For example in Illinois there is no contingency

in which an execution may be awarded or issued against a municipal corporation (Freeman, Law of Execution, 3rd Ed., 1900, Vol. 1, pp. 537-538), and this is the general rule in other jurisdictions (Ibid., pp. 67-68). See *City of Chicago* v. *Halsey*, 25 Ill. 485. "The award of execution to produce satisfaction constitute(s) no part of the judgment": the judgment "simply contains the conclusion of 'law upon the facts proved, and leaves the party to his legal and appropriate writ to enforce it'." Freeman on Judgments, 4th Ed., 1892, p. 3. It further presupposes that if execution be awarded that the trust property could be taken to satisfy the liability. The decision of the Supreme Court of Illinois in *Moore* v. *Moyle*, 405 Ill. 555, is sufficient authority that it could not. (Frankly, although it is not necessary to a decision in this case, petitioners believe that in the present case they have a right to execution and that any limitation on the right to take the so-called trust property would deprive them of their constitutional rights. But that does not affect the unsoundness of the reasoning upon which the opinion of the Illinois Appellate Court in the instant case is predicated.) The rule announced by the Illinois Appellate Court makes the entry of judgment and the amount of the judgment depend upon a factor totally alien to the questions of fault, tort liability, damages and right to satisfaction (*Anderson* v. *Armstrong*, 180 Tenn. 56; *St. Mary's Academy of Sisters* v. *Solomon*, 177 Colo. 463; *Shurleff* v. *Wiscasset*, 74 Me. 140; *Hopkins* v. *Clemson Agricultural College*, 221 U.S. 636) (Rec. 47-48).

A judgment establishes (a) the right to recover from the defendant, (b) the amount of the damages sustained by the plaintiff, (c) his right to supplemental proceedings to discover and reach property belonging to the judgment debtor to satisfy the liability, (d) preserves his right to satisfaction until barred by statute or rule of common law,

and (e) preserves his right to revive the judgment. All these benefits are denied the plaintiff under the rule established by the Appellate Court of Illinois in this case. For the reasons stated immunity in the instant case is utterly unreasonable and discriminatory.

D. Illinois, therefore, in enforcing any immunity to judgment deprives an injured person of his fundamental right to personal security and property without due process of law.

The purpose of the due process clause was to afford immunity from any violation of fundamental right. The first use of the phrase "life, liberty, and property without due process of law" in this country appears in the Fifth Amendment to the Constitution of the United States. It had appeared in an act of October 12, 1692, Art. 5 (Acts and Resolves of the Province of Massachusetts Bay, Vol. I, Chap. 11, Art. 5, p. 40) of the General Court of Massachusetts Bay. In England it appears in the statute of 28 Edward III (Statutes at Large of Great Britain and Ireland, Vol. 1, p. 643). Before the adoption of the Fifth Amendment colonial declarations of rights of the colonies had for the most part used the phrase of Magna Charta, "law of the land". It is now the law of the United States that the phrases "law of the land" and "due process of law" were intended to be synonymous (*Greene* v. *Briggs*, 1 Curtis (U.S.) 311; *Murray* v. *Hoboken Land and Improvement Company*, 18 How. (U.S.) 272; *Davidson* v. *New Orleans*, 96 U.S. 97; *French* v. *Barber Asphalt Paving Company*, 181 U.S. 324; *Twining* v. *New Jersey*, 211 U.S. 78.

The phrase "due process of law" was not limited by anything short of the general purpose to afford immunity from any violation of fundamental rights. Charles E.

Hughes, The Supreme Court of the United States, 1927, pp. 185-188; *Chicago B. & Q. R.R.* v. *Chicago,* 166 U.S. 226, at 235; *People ex rel. Joyce* v. *Strasheim,* 242 Ill. 359.

Due process requires that every citizen shall have the protection of the general rules that govern society—that is established principles of private rights and distributive justice. Webster's argument, *Dartmouth College* Case, 4 Wheat. 518, 581-582; *Bank of Columbia* v. *Okely,* 4 Wheat. 235, at 244.

The fundamental rights protected by the due process clause are determined from an examination of the principles of the common law of England acted upon by the colonists after the settlement of this country. In *Murray's Lessee* v. *Hoboken Land and Improvement Co.,* 18 How. (U.S.) 272 it was definitely recognized that the principles of the common law are to be considered the acid test of what procedure was or was not due process of law. (Mott, Due Process, 245) *Davidson* v. *New Orleans,* 96 U.S. 97, and *Hurtado* v. *California,* 110 U.S. 516, likewise so hold. See also *Westervelt* v. *Gregg,* 12 N. Y. 202, In *re Peterson,* 253 U.S. 300.

Looking to the English law we find that under that law it was said as early as the reign of Edward III (when the phrase "due process" was first used) a statute would be void if it was against common right, and under Henry VI (1422-1461) an act giving summary powers of confiscation to a corporation of dyers in London was held to be against the law of the land (Mott, Due Process, Sec. 20). By the time of the Stuarts it was axiomatic that all trials must conform to a regular form of legal procedure. James I recognized this as essential to all judgments in a speech in the Starre-Chamber in 1616 (C. H. McIlwain, Political Writings of James I, Vol. 1, pp. 326-340).

Therefore those laws which discriminate as to remedies in the courts must certainly be considered contrary to due process. Mott, Due Process, 293. While the Fourteenth Amendment does not prevent a state from prescribing a reasonable and appropriate condition precedent to the bringing of a suit of a specified kind or class so long as the basis of distinction is real and the condition imposed has reasonable relation to a legitimate object (*Jones* v. *Union Guano Co., Inc.*, 264 U.S. 171, 44 S. Ct. 280, at 282), those laws which discriminate as to remedies in the courts are invalid. *Forbes Pioneer Boat Line* v. *Board of Commissioners*, 258 U.S. 338, 42 S. Ct. 325.

Truax v. *Corrigan*, 257 U.S. 312, condemned the *legislative action* of a state which stripped an injured party of all real remedy as being at variance with the principles of due process, stating that the legislative power of a state could only be exercised in subordination to the fundamental principles of right and justice which the guarantee of due process was intended to preserve, and that a purely arbitrary or capricious exercise was violative of due process. It is also well settled that the action of state *courts* in enforcing a substantive common-law rule formulated by those courts may result in the denial of rights guaranteed by the Fourteenth Amendment even though the judicial proceedings in such cases may have been in complete accord with the most vigorous conceptions of procedural due process. *Shelley* v. *Kraemer*, 334 U.S. 1, 14-18; *C. B. & Q. R.R.* v. *Chicago*, 166 U.S. 226.

It follows that a state acting through its judiciary may not deprive a person of all existing remedies for the enforcement of a right which the state has no power to destroy without giving him some real opportunity to protect it. *Brinkerhoff-Faris* v. *Hill*, 281 U.S. 673.

The violation of these principles in the instant case was called to the attention of the Supreme Court of Illinois in the suggestions to the motion to vacate the order dismissing the writ of error (Rec. 72-79), but that court apparently did not note their application to this case.

We have established here as we did before that court that the purpose of the due process clause was to afford immunity from any violation of fundamental right; the meaning of due process is that every citizen shall have the protection of the general rules that govern society—that is the established principles of private rights and distributive justice; the fundamental rights protected by the due process clause are determined from an examination of the principles of the common law of England acted upon by the colonists after the settlement of this country; the action of state courts in enforcing a substantive common-law rule formulated by them may result in a denial of rights guaranteed by the Fourteenth Amendment even though the judicial proceedings in such cases may have been in accord with the most vigorous conceptions of procedural due process; and that a state acting through its judiciary may not deprive a person of all existing remedies for the enforcement of a right which the state has no power to destroy without giving him some real opportunity to protect it.

The decision in *Nicholson* v. *Good Samaritan Hospital,* 145 Fla. 360 (1940) holds that the rule violates due process of law and should be conclusive in this case since our Constitution has a provision similar to the one on which the Florida decision is based. In that case an action was filed against the hospital for the recovery of damages alleged to have been sustained by a patient as a result of the negligence of the nurses employed by the defendant. The declaration tested by the rules obtaining in ordinary cases

not involving charitable institutions showed a right of action, but the defendant sought exemption from liability on the ground that it was engaged in the business of conducting a charitable hospital. The court said at page 367:

> "While our Constitution exempts charitable corporations from taxation, nothing appears in the Constitution, statutes or judicial decisions of this State with regard to the exemption of charitable institutions from liability for the torts of their servants. However, we do find set out in the organic law of our State the following:
>
> " 'All courts in this State shall be open, so that every person for any injury done him in his lands, goods, or person or reputation shall have remedy, *by due course of law, and right and justice shall be administered without* sale, *denial*, or delay.' " (Italics supplied.) Declaration of Rights, Sec. 4, Constitution.
>
> "Thus it would appear that the public policy of this State as enumerated by its Constitution, is to put justice 'by due course of law' above or before charity. As stated by the Court in *Sheehan* v. *North County Community Hospital*, 273 N. Y. 163, 7 N.W. (2d) 28: '. . . to impose liability is to beget careful management; and that no conception of justice demands that an exception to the rule of respondeat superior be made in favor of the resources of a charity and against the person of a beneficiary injured by the tort of a mere servant or employee functioning in that character.'
>
> "There is no doubt but that the public has an interest in the establishment and maintenance of charitable institutions, whose beneficent value is generally recognized and appreciated, but it also has an interest in obliging corporations undertaking the performance of charitable duties, vitally affecting the lives and health of our citizens, to perform them carefully, and therefore the public also has an interest in this matter of exempting a charitable corporation from liability for its negligence. A charitable institution should be just before being charitable or generous.
>
> "The quotation from *Sheehan* v. *North County Community Hospital, supra*, recognizes the fact that to

> exempt charitable institutions from liability for the torts of their servants is to create an exemption to the well-founded and salutary doctrine of respondeat superior, which doctrine is in this State so much a part of 'due course of law', referred to in the above quoted section of our Constitution, as to require its recognition in cases of this kind in the absence of legislation to the contrary. There is no legal principle which would justify this Court in making such an exception, in view of the above quoted constitutional provisions. The creation of such exemption is a legislative prerogative."

These principles of the common law have the sanction of settled usage in England and in this country. They are part of the general rules that govern society, that is, they are established principles of private right and distributive justice and are, therefore, part and parcel of what is deemed "due process of law."

> "It seems to us that a statute which declares in terms and without more that the full and exclusive title of a described piece of land, which is now in A, shall be and is hereby vested in B, would if effectual, deprive A of his property without due process of law." *Davidson* v. *New Orleans,* 96 U.S. 102.

In *Silva* v. *Providence Hospital of Oakland* (1939), 14 Cal. (2d) 762, 775-776, 97 P (2d) 798, 804-805, the court said:

> "To require an injured individual to forego compensation for harm, when he is otherwise entitled thereto, because the injury was committed by the servants of a charity, is to require him to make an unreasonable contribution to the charity, against his will, and a rule of law imposing such burdens cannot be regarded as socially desirable nor consistent with sound policy."

In *Mulliner* v. *Evangelischer Diakonniessenverein* (1920), 144 Minn. 392:

> "We do not approve the public policy . . . which would compel the persons damaged to contribute their

loss to the purpose of even the most worthy corporation."

In *Hopkins* v. *Clemson Agricultural College* (1911), 55 U.S. Sup. Ct. R., L Ed. p. 890 the court said:

> "If the state had in so many words granted the college authority to take or damage the plaintiff's property for its corporate advantage without compensation, the Constitution would have substituted liability for the attempted exemption."

Yet here petitioners who have shown that the verdict in their favor was ripe for judgment according to the course and usage of the common law, that it is a fundamental right because it is the right of personal security itself that is involved which avails against all persons whomsoever, that there was no error in the trial which would invalidate that verdict and that defendant was not immune from judgment in an action in tort, find that the courts of Illinois have finally barred the door to the correction by further appeal of the error of denying them judgment and thus finally deprived of their constitutional rights by the State of Illinois. They are thus compelled to seek the vindication in this Court of their right to due process of law under the Fourteenth Amendment.

E. The State of Illinois, therefore, in enforcing any Immunity to Judgment denies to an injured person the equal protection of its laws.

Section 1 of the 14th Amendment provides: "No State shall * * * deny to any person within its jurisdiction the equal protection of the laws." Mr. Justice Matthews, in *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369, said this was "a pledge of the protection of equal laws." Chief Justice Taft, in *Traux* v. *Corrigan*, 257 U.S. 312, 338, said: "Our whole system of law is predicated on the general fundamental principle of equality of application of the law. 'All men

are equal before the law,' 'This is a government of laws and not of men,' 'No man is above the law,' are all maxims showing the spirit in which * * * courts are expected to * * * apply laws. But the framers and adopters of this amendment were not content to depend on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be insisted on by local public opinion. They therefore embodied that spirit is a specific guaranty." He went on to say: "The guaranty was aimed at *undue favor* and individual or *class privilege*, on the one hand, and at hostile *discrimination*, on the other. It sought an equality of treatment of all persons even though all enjoyed the protection of due process. * * * Thus the guaranty was intended to secure equality of protection *not only for all but against all similarly situated.* Indeed, protection is not protection unless it does so. *Immunity granted to a class however limited, having the effect to deprive another class however limited of a personal or property right, is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of, or the deprivation of right permitted worked against, a larger class.*" (Italics ours.) He concluded: "the equality clause * * * forbids the granting of equitable *relief to one man and denying of it to another under like circumstances and in the same territorial jurisdiction* * * * *It means that no person or class of persons shall be denied the same protection of the laws, which is enjoyed by other persons or other classes in the same place and under like circumstances.*" (Italics ours.)

In *Frost* v. *Corporation Commission* (1928), 278 U.S. 515, 522, this Court said: "The purpose of the clause in respect of equal protection of the laws *is to rest the rights of all persons upon the same rule under the same circumstances. Louisville Gas Co.* v. *Coleman*, 277 U.S. 32, 37."

(Italics ours.) As one state court has said: "The words seem so plain as to exclude the need of refinements in interpretation. Though prohibitory, they contain a necessary implication of a *positive right*—the right to an equality before every law, the right of the citizen *to be free in any State, from unjust discrimination between him and other persons, as to legal rights and duties.* Such is the plain meaning of the amendment. *Strauder* v. *West Virginia,* 100 U.S. 303." (Italics ours.) *State of Maine* v. *Cohen* (1935), 133 Me. 293, 300.

Petitioners' federal right to the equal protection of the laws has been violated by the State of Illinois. Immunity to liability in tort has been granted to a narrow class consisting of private charitable corporations *not presently endowed at the time of trial with liability insurance or other non-trust funds* (a) This "immunity from suit is a high attribute of sovereignty—a *prerogative* of the state itself" which creates *"a privileged class, free from liability for wrongs inflicted or injuries threatened"* for corporations "must be liable to the law, unless they are put above the law." (Italics ours.) (*Hopkins* v. *Clemson Agricultural College,* 221 U.S. 636), (b) the effect of which is to deprive another class consisting of persons who have been injured by the corporation *not presently endowed at the time of trial with liability insurance or other non-trust property* of their right to judgment on a verdict (personal security and property) in a situation in which all other private persons individual or corporate would be liable including charitable corporations presently possessed at the time of trial with liability insurance or other non-trust funds (*Moore* v. *Moyle,* 405 Ill. 555) and even private charitable corporations *not presently endowed with liability insurance or other non-trust property* which do not plead immunity (*Marabia* v. *Mary Thompson Hospital,* 309 Ill. 147), (c) and

make such corporation liable to judgment in tort only when it chooses to be so—for the holding of non-trust property, or the carrying of liability insurance (and the amount thereof), whether intentional or otherwise, are matters of voluntary action—thus in effect permitting the corporation to be a judge in its own cause (d) although such corporation could itself maintain an action in tort against a natural person by cross-complaint or otherwise and secure a judgment without restriction, and (e) the granting of relief against a master under the maxim *respondeat superior* in all other cases and the denial of that relief when the master is a private charitable corporation not presently endowed with liability insurance or other non-trust property at the time of trial is utterly unreasonable because the presence or absence of such assets is, as has been shown, an irrelevant and improper consideration and immunity deprives the injured person of his right to personal security and indemnity for its violation.

It follows that under the decisions of this Court and other courts that the State of Illinois in enforcing immunity under the circumstances of this case unjustly discriminates against persons injured by the torts of private charitable corporations not presently possessed of liability insurance or other non-trust property at the time of trial. Since, as has been shown immunity of charitable corporations was not recognized by the common law of England at the time this country was founded and was not part of the common law of Illinois or other state (or colony) at any time prior to July 28, 1868, it is not part of the old common law of the land, it cannot be tolerated on the ground it is due process of law. Consequently, when the immunity rule was enforced against petitioners in the instant case the State of Illinois denied petitioners their federal right to the equal protection of the law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. Counsel have shown:

(a) That there is a final judgment or decree;

(b) That the decision sought to be reviewed is by the highest court of the state in which decision could be had;

(c) That the case presents a substantial federal question;

(d) That the federal question sought to be reviewed was properly raised and preserved in the state courts; and

(e) That the decision of the highest court of the state does not rest upon a state ground which independently and adequately supports the judgment or decree.

It follows there is no jurisdictional impediment.

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